State Memo re: SF

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

and

STATE OF MINNESOTA, by its Attorney General Warren Spannaus, its Department of Health, and its Pollution Control Agency,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION; HOUSING AND REDEVELOPMENT AUTHORITY OF ST. LOUIS PARK; OAK PARK VILLAGE ASSOCIATES; RUSTIC OAKS CONDOMINIUM INC.; and PHILIP'S INVESTMENT CO.,

Defendants.

Civil No. 4-80-469

and

CITY OF ST. LOUIS PARK,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION,

Defendant.

and

CITY OF HOPKINS,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION,

Defendant.

PLAINTIFF-INTERVENOR STATE OF MINNESOTA'S STATEMENT OF POINTS AND AUTHORITIES IN OPPOSITION TO THE DEFENDANT REILLY TAR & CHEMICAL CORPORATION'S MOTION TO DISMISS THE STATE'S AMENDED COMPLAINT IN INTERVENTION (SUPERFUND MEMORANDUM)

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INTRODUCTION

This brief will address Defendant Reilly Tar and Chemical Corporation's motion to dismiss claims asserted by the State of Minnesota under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (hereinafter "the Superfund Act"), P.L. 96-510, 42 U.S.C.A. § 9601, et seq. 1/ The State's claims under the Superfund Act are set forth in Count VI of its Amended Complaint in Intervention (hereinafter "the Amended Complaint"). The State has presented the factual background of this case and has addressed Reilly Tar's motion to dismiss claims under § 7003 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6973, in its brief dated June 15, 1981. 2/

The Supplemental Statement of Points and Authorities in Support of Defendant Reilly Tar & Chemical Corporation's Motion to Dismiss the Complaints of the Intervenors, dated August 19, 1981, (hereinafter "First Reilly Tar Superfund Brief") argues that the State's count under the Superfund Act must be dismissed without prejudice because it fails to state claims for relief or states claims which are premature. The State will demonstrate in this memorandum that its Superfund Act count states claims for relief and are ripe for adjudication.

1/ The statute is presently found in the 1980 Laws Special Pamphlet volume of the United States Code Annotated. Following Reilly Tar's practice, the initial citation to a section will include its section number in the statute and its codification in U.S.C.A. Subsequent citations will use the section number in the statute.

2/ Since the filing of that brief, the New Jersey federal district court has ruled that § 7003 imposes liability for current pollution conditions on parties whose active disposal ceased before enactment of § 7003 and who no longer own the disposal site. United States v. Charles Price, Civ. No. 80-4104 (D.N.J. September 23, 1981). The Price decision, which is attached as Appendix C to Reilly Tar's Reply Brief of October 16, 1981, adds further support to the construction of § 7003 urged in the memoranda of the State and the United States.

STATUTORY BACKGROUND

Amid intense media attention to the problems posed by improper toxic waste disposal, 3/ the 96th Congress passed the Superfund Act in its closing days and President Carter signed it into law on December 11, 1980. Passage of the legislation followed over three years of Congressional committee consideration of various proposals and public hearings held across the country. 4/ The Superfund Act is certain to become one of the most powerful legal weapons in the arsenal of government because of its standard of strict liability for any release of a hazardous substance and its creation of a governmental cleanup mechanism to respond to more serious problems which are not being addressed by the responsible parties.

The present motion to dismiss concerns the liability provisions of §§ 106 and 107 of the Superfund Act plead by the Plaintiffs. Understanding of the role of these liability provisions, and assessment of Reilly Tar's argument to narrow their scope, requires an overview of the framework of the statute. That framework includes five mechanisms for addressing releases, and threatened releases, of hazardous substances:

1. Notification Requirements.
Superfund Act §§ 102-103. 42 U.S.C.A. §§ 9602-03.

Section 103 requires notification to the EPA of releases of hazardous substances including the location, contents, and possible releases from inactive hazardous waste sites.

2. Federal Response.
Superfund Act § 104. 42 U.S.C.A. § 9604.

Section 104 authorizes two levels of federal response to releases and threatened releases of hazardous substances. The first level of response includes "removal"

3/ See, e.g., the cover story on "The Poisoning of America" in Time, September 22, 1980.

4/ The Second Session of the 96th Congress considered three Superfund bills (H.R. 85, H.R. 7020, S. 1480) before enacting a last minute compromise version worked out in the Senate. Attached as Appendix A is the Congressional Quarterly Almanac summary of Congressional consideration of these bills and passage of the Superfund Act. 1980 Cong. Q. Almanac 584. Superfund proposals were also considered in the previous two sessions of Congress, S. 1341 and S. 1480 (96th Cong. 1st Sess.) and S. 2083 (95th Cong. 2nd Sess.).

activities of an immediate and short-term nature. Examples of these activities would be emergency containment, damage mitigation, investigation, and risk assessment. Except in exigent circumstances described in § 104(c)(1), removal actions may not exceed $1,000,000 in cost or six months in time.

The second level of response includes "remedial actions" of a permanent nature. Typical remedial activities would be long-term containment programs, neutralization or off-site disposal of hazardous substances, and permanent relocation of residents. A condition to federally funded remedial action under § 104(c)(3) is a federal-state agreement assuring long-term site maintenance, state assurance of availability of a RCRA permitted site for any off-site disposal of hazardous substances, and State assurance of payment of ten percent (10%) of remedial costs.

3. Liability for Releases. Superfund Act §§ 106-107. 42 U.S.C.A. §§ 9606-07.

Section 107(a) makes the following persons responsible for response costs and for damages to natural resources: owners and operators of the source of a release, owners and operators of the source at the time of disposal, generators, and transporters who select the disposal site. The federal and state governments are authorized in § 107(f) to recover for damages to natural resources. No right of action is created for personal injuries resulting from a release. 5/

The federal government is authorized in § 106 to utilize imminent hazard injunctive actions or administrative orders against responsible parties.

4. Hazardous Substance Response Trust Fund. Superfund Act §§ 111-112, 221-223, 303. 42 U.S.C.A. §§ 9611-12, 9631-33, 9653.

Sections 221-223 establish a Hazardous Substance

5/ Compensation for personal injuries from releases of hazardous substances was a major issue in the Superfund debates of the 96th Congress. A bill, S. 1486 (97th Cong. 1st Sess.), has been introduced in the current session to amend § 107(a) of the Superfund Act to create a federal cause of action for such personal injuries. The bill and accompanying comments of its sponsor, Senator Mitchell, are found at 127 Cong. Rec. S. 7693-94 (July 15, 1981).

Response Trust Fund (hereinafter "Response Fund") for federal fiscal years 1981-85 financed by taxes on crude oil and petrochemical feedstocks, federal appropriations, and judgments awarded the United States under the Superfund Act and § 311 of the Clean Water Act, 33 U.S.C. § 1321. Section 111 authorizes expenditures from the Response Fund for several purposes, including payment of governmental and private response costs, assessment and restoration of natural resource damages, enforcement actions against parties responsible for releases, epidemiological studies, diagnostic services, and health effects studies. Section 112 sets forth procedures for filing and determining claims against the Fund.

5. Financial Responsibility and Post-Closure Liability Trust Fund.
Superfund Act § 108, 231, 232. 42 U.S.C.A. §§ 9608, 9641.

Section 108 authorizes promulgation of financial responsibility standards for persons dealing with hazardous substances. Sections 231-232 establish a Post-Closure Liability Trust Fund which will assume perpetual liability for closed hazardous waste disposal facilities which have received permits under the RCRA programs, and satisfy certain closure requirements. This trust fund is financed by a tax on hazardous waste disposal.

ARGUMENT

This brief will demonstrate that section 107 of the Superfund Act creates for the states federal causes of action for costs of responding to releases of hazardous substances and for natural resource damages which may remain after response measures are concluded. The brief will show that Minnesota's Amended Complaint states claims for relief under section 107 and that those claims are not premature. In addition, it will show that the scope of relief under § 107(a)(4)(A) extends to all state expenditures which qualify as "removal" or "remedial action" and which are not inconsistent with the National Contingency Plan.

I. MINNESOTA'S AMENDED COMPLAINT STATES A CLAIM UNDER SECTION 107(a)(4)(A) OF THE SUPERFUND ACT FOR RESPONSE COSTS NOT INCONSISTENT WITH THE NATIONAL CONTINGENCY PLAN.

The scheme of liability established by § 107(a)(4)(A) of the Superfund Act is straightforward. The section states in pertinent part:

> (a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section -
>
> . . . .
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> . . . .
>
> (4) . . . from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for -
>
> > (A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;

The Amended Complaint alleges that Reilly Tar is a party liable under § 107(a)(2) for the expenses enumerated in § 107(a)(4). 6/ Reilly Tar is a responsible party under paragraph (a)(2) because it is a "person" 7/ who engaged in "disposal" 8/ of "hazardous substances" 9/ such as creosote and other coal tar derivatives at

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6/ As noted at page 9 of the State's June 15, 1981, Memorandum, all allegations of the Amended Complaint must be accepted as true for purposes of the motions to dismiss and all reasonable inferences from the pleading must be drawn in the State's favor.

7/ "Person" is defined in § 101(21), 42 U.S.C.A. § 9601(21), to include "an individual, firm, corporation, association, partnership, consortium, joint venture, [or] commercial entity."

8/ "Disposal" is defined in § 101(29), 42 U.S.C.A. § 9601(29), by reference to the definition in 42 U.S.C. § 6903. The latter section states:

> The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

9/ Hazardous substance is defined in § 101(14), 42 U.S.C.A. § 9601(14) to include, inter alia, any hazardous waste "having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act." As explained at paragraphs 36-37 of the Amended Complaint, the coal tar and coal tar derivatives disposed of at the Reilly Tar site are such hazardous substances.

a "facility" 10/ it owned and operated for the refining of coal tar and the pressure treating of wood products. "Releases" 11/ of creosote and other coal tar derivatives from the Reilly Tar facility have occurred, are presently occurring, and threaten to occur in the future. These releases render Reilly Tar liable under paragraph (a)(4) for the three categories of expenses enumerated in subparagraphs (A), (B), (C) of § 107(a)(4). Under subparagraph (A), 12/ two questions must be answered affirmatively to state a claim for relief: (1) whether any of these expenditures qualify as "costs of removal or remedial action," and (2) whether such costs are "not inconsistent with the national contingency plan."

A. THE STATE EXPENDITURES QUALIFY AS "REMOVAL OR REMEDIAL COSTS."

The Giese Affidavit of June 5, 1981 (hereinafter "First Giese Affidavit"), lists State efforts responsive to the contamination attributed to Reilly Tar including evaluation of health risks, monitoring of public water supplies, studies of groundwater flow and contaminant transport, well investigations, well abandonment, and evaluation of possible remedial measures. The Giese affidavit of December 21, 1981 (hereinafter "Supplemental Giese Affidavit") describes continued monitoring which has led to further well closures and explains federal

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10/ Facility is defined in § 101(9), 42 U.S.C.A. § 9601(9):

> "facility" means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located.

11/ "Release", as defined in § 101(22), 42 U.S.C.A. § 9601(22), means, in pertinent part, "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment."

12/ Only subparagraph (A) of § 107(a)(4) will be addressed in this section of the brief. Minnesota also has a claim for natural resource damages under subparagraph (C) of § 107(a)(4). That claim is discussed in Sections II and III, infra at 19-30.

funding which has been received for a joint federal-State program to investigate two 1,000 foot wells on the former Reilly site, to locate other multi-aquifer wells, and to develop a pilot program for evaluating treatment of water from a heavily contaminated municipal well.

These activities are to be measured against the definitions of "removal" or "remedial action" in §§ 101(23) and (24) of the Superfund Act, 42 U.S.C.A. § 9601(23) and (24). If the activities come within the scope of either definition, they are recoverable under subparagraph (A) of § 107(a)(4). Since the activities described are concerned with investigation, risk assessment, damage mitigation, and feasibility study, they come within the definition of "removal" in § 101(23):

> (23) "remove" or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provisions of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief Act of 1974.

(Emphasis added.)

Alternatively, the State's activities come within the definition of "remedial action" which is set out in the margin below . 13/

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13 / The first two sentences of the lengthy definition of "remedy" provide its basic import:

> (24) "remedy" or "remedial action" means those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released

Later tasks directed toward permanent solutions would come within the definition of "remedial action." 14/

The activities which the State has performed and is continuing to perform come within these definitions and thus satisfy the requirement that "removal or remedial costs" be incurred.

B. THE STATE'S EXPENDITURES ARE "NOT INCONSISTENT WITH THE NATIONAL CONTINGENCY PLAN."

Under § 311(c)(2) of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1321(c)(2), the National Oil and Hazardous Substances Pollution Contingency Plan (hereinafter "NCP") was promulgated to provide guidance for federal and state response to discharges of oil and hazardous substances to navigable waters of the United States and adjoining shoreline. 15/ Under § 105 of the Superfund Act, 42 U.S.C.A. § 9605, the NCP is to be revised to address response to hazardous substance releases under the Superfund Act. Reilly Tar contends that until the NCP is revised there can be no liability under subparagraph (A) of § 107(a)(4) because it is impossible to

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13/ Footnote continued:

> hazardous substances or contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment.

14/ The State will seek through this action a declaration that Reilly Tar is also liable for subsequent removal or remedial action not inconsistent with the National Contingency Plan.

15/ The requirement of a plan to respond to oil discharges had been part of federal water quality legislation for a number of years. The Federal Water Pollution Control Act Amendments of 1972 required that the NCP be expanded to address hazardous substances as well. Pub. L. 92-500 §2, 86 Stat. 862, 865-866. The NCP promulgated to meet this expanded scope is found at 40 C.F.R. Part 1510, and its provisions are discussed, infra, at 11-12.

determine if response costs are "not inconsistent with the national contingency plan." First Reilly Tar Superfund Brief at 5. As will be demonstrated, the existing NCP was intended by Congress to be used for Superfund purposes until revised and its general guidance is applicable to all hazardous substance releases.

Section 105 directed that the President shall:

> Within one hundred and eighty days after the enactment of this Act [December 11, 1980]. . . revise and republish the national contingency plan for the removal of oil and hazardous substances, originally prepared and published pursuant to Section 1321 of Title 33, to reflect and effectuate the responsibilities and powers created by this Act, in addition to those matters specified in section 1321(c)(2) of Title 33.
>
> * * * *
>
> . . .Following publication of the revised national contingency plan, the response to and actions to minimize damage from hazardous substances releases shall, to the greatest extent possible, be in accordance with the provisions of the plan.

The President failed to meet the 180-day deadline and at the writing of this brief, almost a year after enactment of the Superfund Act, the revisions of the NCP still appears to be some time away. 16/ Although Reilly Tar argues that the failure to revise the NCP defeats all claims for response costs under Section 107(a)(4)(A), the definition of "national contingency plan," section 101(31), legislative history and comments on the Superfund Act, contemporaneous federal agency interpretation, and the substance of the existing NCP all support the conclusion that the existing plan can be used for purposes of Section 107(a) liability.

Congress provided in section 107(a)(4)(A) and (B) that response costs are to be evaluated under the "national contingency plan." It stated in section 101(31), 42 U.S.C.A. § 9601(31):

16/ The last published information on the status of the NCP revision is that it was submitted by the EPA to the Office of Management and Budget for review on October 21, 1981. 12 Envtl. Rep. (BNA) 805 (October 30, 1981).

> (31) "national contingency plan" means the national contingency plan published under section 1321(c) of Title 33 or revised pursuant to section 9605 of this title.

Thus, by definition, the NCP promulgated under 33 U.S.C. § 1321(c) is valid for evaluating response costs under section 107(a)(4)(A) of the Superfund Act.

Moreover, the nature of the NCP as an evolving, flexible guide to response logically requires that response costs be evaluated under the version of the NCP in effect when the response measures are undertaken. The existing NCP is the product of a revision to include hazardous substance discharges required by the Federal Water Pollution Control Act Amendments of 1972, and it will again be revised in accordance with the requirements of § 105 of the Superfund Act. Under the last sentence of § 105, the President is authorized to revise it further from time to time. With evolving guidelines of this nature, the only reasonable interpretation of the requirement that response costs be "not inconsistent with the national contingency plan" is that the response measures be evaluated under the NCP as it exists when these measures are undertaken.

The application of the existing NCP to the Superfund Act is further illustrated by the statement of Senator Jennings Randolph, Chairman of the Senate Environment and Public Works Committee and co-sponsor of the bill, in introducing the final Superfund bill on the Senate floor. Senator Randolph stated that the existing NCP was to remain in effect so that no "regulatory gaps" would arise:

> This expansion of the section 311 program is expected to proceed without creation of regulatory or other gaps. It is intended that existing authority and regulations issued under section 311 of the Clean Water Act continue until superceded [sic] or revised by the implementation of this act. Response capabilities, notification requirements, existing regulations and the national contingency plan will remain in effect until replaced or supplemented under authority of this act.

126 Cong. Rec. S. 14,965 (daily ed. Nov. 24, 1980). Similar views are expressed in the comments of Representative James Florio, Chairman of the House Transportation and Commerce Subcommittee

and House sponsor of the Superfund Act. In recent oversight hearings, Representative Florio said ". . .delay in publishing the plan . . . cannot be used as a measure for not going forward with enforcement actions." 17/

The Environmental Protection Agency, the federal agency delegated primary responsibility for implementation of the Superfund federal programs, 18/ has undertaken federal response actions under § 104 at the Reilly Tar site and other sites around the nation. 19/ These actions signify the EPA's determination that it can proceed with response actions "consistent with the national contingency plan" under § 104(a)(1) without waiting for revision of the NCP. This contemporaneous agency interpretation is further affirmation that the existing NCP is to be effective under the Superfund Act. 20/

Finally, the guidance provided in the existing NCP demonstrates that the existing plan can be used for evaluating response measures under § 107(a). The utility of the existing NCP for hazardous substance response can readily be illustrated by comparing governmental response action in St. Louis Park with the existing plan. The existing NCP, in accordance with 33 U.S.C. § 1321(c)(2)(F) and (G), includes general procedures for

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17/ Page 22 of the transcript of the hearings of the Oversight Subcommittee of the House Committee on Energy and Commerce (July 29, 1981). The transcript was submitted to this Court in conjunction with Reilly Tar's First Superfund Brief.

18/ See Executive Order 12316, 46 Fed. Reg. 42,237 (August 20, 1981)

19/ In addition to initial response actions under § 104(b), as at the Reilly Tar site, the EPA has undertaken permanent remedial action under § 104(c)(3). See 12 Envtl. Rep. (BNA) 548. (August 28, 1981).

20/ The Supreme Court has observed:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.

Udall v. Tallman, 380 U.S. 1,16 (1965)

identifying, containing, dispersing, and removing hazardous substances. These procedures are set out in the regulations at 40 C.F.R. Part 1510.

The local, state, and federal response to the contamination from the Reilly Tar site has in no way been inconsistent or incompatible with these regulations. For example, § 1510.52(a) of the NCP deals with evaluation and initiation of action and requires the officer coordinating responses to:

> (1) Evaluate the magnitude and severity of the discharge or threat; (2) determine the feasibility of removal, and (3) assess the effectiveness of removal actions.

Section 1510.53, dealing with containment and counter measures, provides for defensive action "to protect the public health and welfare" such as:

> Analyzing water samples to determine the source and spread of the pollutants; procedures to control the source of the discharge; . . . placement of physical barriers to deter the spread of a pollutant;

Section 1510.54, dealing with cleanup, mitigation and disposal, provides for "[a]ctions [that] should be taken to recover the pollutant from the water and affected shorelines."

As described in the Affidavits of David J. Giese, actions taken and planned by the State to respond to the soil and groundwater contamination from the Reilly Tar site directly parallel these provisions of the NCP. The Barr study, the United States Geological Survey studies, and the recently funded State-federal well investigation project have sought to define the magnitude and severity of the contamination problems; the Minnesota Department of Health municipal well monitoring program and recommendations for well closure have pursued protection of the public health; and the well abandonment program has sought to establish physical barriers to prevent spread of contaminants to deeper aquifers. Finally, the Hickok study completed this month and the recently funded State-federal program to evaluate the effectiveness of treating well water both aim at determining costs and feasibility of remedial measures.

While a motion to dismiss is not an appropriate stage for evaluating each past, present, and proposed response cost, it is appropriate to point out that the standard "not inconsistent with" is the least confining language of limitation. This standard was especially chosen for subparagraph (A) of § 107(a)(4); it is not used elsewhere in the Superfund Act. Contrast this language with the choice of "consistent" in § 104(a)(1) and § 107(a)(4)(B). "Inconsistent" is defined in Webster's New World Dictionary of the American Language (2nd college ed. 1976) as "incompatible, self-contradictory, changeable." Thus, "not inconsistent with" requires only that state response costs be "compatible with" and "not contradictory of" the NCP. 21/ The response costs described in the Amended Complaint and the Giese Affidavits satisfy this standard. 22/ The Court must conclude that Minnesota's claim under § 107(a)(4)(A) for costs of removal or remedial action are "not inconsistent with the national contingency plan."

21/ A very similar definition of "inconsistent" was applied in holding a preexisting "transaction" immunity statute not inconsistent with a new "use" immunity statute in In Re Brown, 329 F.Supp. 422 (S.D. Iowa 1971).

22/ Reilly Tar argues at page 6 of its First Superfund Brief that the allegations as they existed on the date of the Amended Complaint are all that this Court may consider. Cases from securities, construction contract, and housing contract disputes are cited for this proposition. The language of these decisions has no application in matters such as the present case where years may pass until damages are discovered, further years are needed to assess the injury and determine the remedial action, and perhaps decades to implement the remedy. For example, in a major environmental suit brought by the State of Michigan, the Consent Decree continues judicial supervision through the year 2030. Kelley v. Hooker Chemical and Plastics Corp. No. 79-22878 CE (Ingham County (Mich.) Circuit Court, 1980). In the environmental context, it is appropriate for the Court to take into account supplemental facts as developed. In this instance, State-federal response expenditures have occurred since filing of the Amended Complaint, and are described in the Supplemental Giese Affidavit. These response measures are appropriate for the Court's consideration on the present motions. Cf. Blanchette v. Conn. General Insurance Corps., 419 U.S. 102, 136-142 (1974) (in which the Supreme Court refused to follow a three-judge district court's holding of prematurity in the Penn Central Railroad/ Conrail reorganization because of a change in circumstances while the appeal was pending). Similar reasoning has been followed in considering subsequent events in order to determine mootness of a claim. E.g., Golden v. Zwickler, 394 U.S. 103 (1969).

C. REILLY TAR'S LIABILITY FOR STATE RESPONSE COSTS IS DETERMINED SOLELY UNDER SECTION 107(a) AND IS NOT, AS REILLY TAR URGES, TIED TO USES AUTHORIZED FOR THE RESPONSE FUND.

Section 107(a)(4)(A) makes Reilly Tar responsible for all State costs of removal or remedial action not inconsistent with the national contingency plan. In a convoluted argument which seeks to tie section 107 liability with the authorized uses of the Response Fund, Reilly Tar would limit drastically the liability scheme created by section 107. Reilly Tar's argument will be shown to be contrary to both specific statutory definitions and general legislative purposes. The scope of liability under section 107 is not limited by the procedures in section 112 for presenting claims against the Response Fund. Moreover, even if there were such a limitation, the authorized uses of the Response Fund under section 111 are far broader than acknowledged by Reilly Tar in its brief.

Reilly Tar's argument, as presented in its First Superfund Brief at 11-14, ends with the conclusion that a party responsible under section 107(a)(4)(A) can be liable to a state only for one narrow category of response costs -- remedial action expenditures jointly financed by the Response Fund and a state in accordance with § 104(c)(3), 42 U.S.C.A. § 9604(c)(3). The path to this conclusion is constructed upon strained and erroneous interpretations of the provisions concerning uses and claims procedures for the Response Fund, §§ 111 and 112 of the Superfund Act (42 U.S.C.A. §§ 9611-9612).

The argument fails at its first step -- the contention that the presentment of claims requirement of § 112(a) is an implicit limitation on liability under § 107(a). Section 112(a) reads in full:

> (a) All claims which may be asserted against the Fund pursuant to section 9611 of this title shall be presented in the first instance to the owner, operator, or guarantor of the vessel or facility from which a hazardous substance has been released, if known to the claimant, and to any other person known to the claimant who may be liable under section 9607 of

> this title. In any case where the claim has not been satisfied within sixty days of presentation in accordance with this subsection, the claimant may elect to commence an action in court against such owner, operator, guarantor, or other person or to present the claim to the Fund for payment.

(Emphasis added.)

Under Reilly Tar's argument, this requirement of presenting a claim to the party alleged responsible is transformed into a curtailment of section 107(a) liability to those costs for which Response Fund expenditures may be made under § 111. 23/

If Congress had had the intent attributed by Reilly Tar to § 112(a), it certainly would have found a less obscure, roundabout manner of limiting the scope of § 107(a). Congress did not intend to limit § 107(a) liability, and the most relevant and thorough document from the legislative history of the Superfund Act expressly so states. The Report of the Senate Committee on Environment and Public Works on S. 1480, S. Rep. 96-848 (96th Cong. 2nd Sess.), analyzed the Senate bill (S.1480) which in large part was incorporated in the final compromise bill passed by Congress. 24/ The provision that was to become § 112(a) of the Superfund Act is found in almost identical wording as § 6(b)(3)(D) of S. 1480. 25/ Section 107(a) of the Superfund Act, although narrower in scope, corresponds with § 4(a) of S. 1480. 26/

23/ The Reilly Tar First Superfund Brief states at 11:

> Section 112 provides for reimbursement either by the Fund or through suits against parties liable under § 107 only for "claims which may be asserted against the Fund pursuant to Section 111."

24/ The bill enacted was captioned H.R. 7020 but was the product of revision of S. 1480 under the leadership of the outgoing and incoming chairmen of the Environment and Public Works Committee, Senators Jennings Randolph and Robert Stafford. Because of its tax provisions, the Superfund Act was deemed a revenue measure and had to originate in the House. Therefore, the Senate retained the H.R. 7020 caption. See 1980 Congressional Quarterly Almanac 592 (attached as Appendix A). Copies of S. 1480 and S. Rep. 96-848 are also attached as Appendices B and C to this brief.

25/ Section 6(b)(3)(D) is found at p. 73 of S. 1480.

26/ Section 4(a) is found at p. 24 of S. 1480.

The Senate Report expressly rejects the position advocated by Reilly Tar:

> Nothing in this section [6] is intended to reduce or apportion the liability of an owner or operator of a site under section 4 of the bill.

S. Rep. 96-848, supra, at 53.

Section 112(a) is simply a procedural prerequisite which provides a responsible party the opportunity to resolve a claim without involvement with the Response Fund or litigation. 27/ Congress did not intend it to be anything more.

Rebuttal of Reilly Tar's attempt to limit the State's recovery of response costs can also be found in the earlier version of the Superfund Act which passed the House (H.R. 7020). This bill expressly stated that liability to the states went beyond Response Fund expenditures. Section 3071 of the bill stated (emphasis added):

> (b) COSTS. - The costs for which liability is imposed under subsection (a) with respect to a release, or threatened release of hazardous waste are the costs of any removal, containment, and emergency assistance or other action provided with respect to such release, or threatened release, under section 3041 (including costs incurred by any person ordered to carry out such action under section 3041 and recovered from the Fund under section 3041(c)), and any costs incurred by a State or local government with respect to such release.
> (c) TO WHOM LIABLE. - The liability for costs described in subsection (b) shall be to the governmental entity which incurred such costs.

When the changes in the final compromise were discussed by the House and Senate floor leaders, no mention was made of any reduction in liability to the states. See remarks of Senate

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27/ The operation of § 112(a) is illustrated in S. Rep. 96-848, 96th Cong. 2d Sess. 84:

> In recovering for resource damage under S. 1480, a State acting as trustee will have rights and responsibilities similar to those of an individual claimant under the legislation. As directed in section 6(b)(3)(D) [§ 112(a) of the Superfund Act] a claim for harm to resources shall in the first instance be presented to the person assumed responsible for such harm. If this claim is unsatisfied, the State or Federal Government may elect to commence an action in court or to present the claim for payment from the Fund.

Minnesota has presented its claim in accordance with § 112(a) and Reilly Tar has responded with a denial of liability. Amended Complaint, paragraph 46.

co-sponsors Senators Randolph and Stafford at 126 Cong. Rec. S. 14,964, 14966-68 (November 24, 1980), and remarks of House sponsor Representative Florio at 126 Cong. Rec. H. 11,787-88 (December 3, 1980). Reilly Tar has no foundation in the language or legislative history of the Superfund Act for its contention that liability to the State under § 107(a) is limited by the presentment procedures of § 112(a).

The failure to link sections 107(a) and 112(a) makes it unnecessary for the Court to examine the next step in the Reilly Tar argument -- the contention that authorized uses of the Response Fund under § 111 (and therefore § 107(a) liability) do not include response actions other than cooperative remedial action under § 104(c)(3). If the Court were to reach the section 111 argument, it must reject Reilly Tar's contention because of the blatant disregard shown for several key terms of the statute.

Reilly Tar first cites § 111(a)(1) which authorizes use of the Response Fund for "governmental response costs incurred pursuant to Section 104." Reilly Tar next states: "That section [§ 104] forbids the President from providing any remedial actions pursuant to that section unless the State [satisfies certain prerequisites]." Reilly Tar First Superfund Brief at 11-12 (emphasis added.) The argument then concludes that since the prerequisites to Response Fund remedial actions at the Reilly Tar site under § 104(c)(3) have not been met, 28/ "Minnesota is not presently eligible to assert any Superfund claims." Id. at 13-14. A fundamental error which flaws this argument is equating the terms "response costs" and "remedial actions." This is an egregious error since both terms are defined in section 101 of the Superfund Act and are central to the federal response mechanism, liability, and Response Fund aspects of the Superfund Act. Section 101(25) defines "response" to include both "remedial action" and "removal." "Removal" is defined in section 101(23) to include first level responses such as emergency containment, damage

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28/ These prerequisites are discussed supra at 3.

mitigation, investigation, and risk assessment. "Remedial action" is defined as second level responses of a permanent nature. Both terms are discussed supra at 2-3 and 6-7. By ignoring these basic definitions of the statute, Reilly Tar reads all removal activities out of the scope of section 111.

As will be discussed in more detail in the Superfund brief of the United States, preliminary field activities at the Reilly Tar site which are being supported by federal funding are "removal" activities under § 104(b) 29/. These activities constitute "governmental response" under § 111(a) but since they are not "remedial actions," they need not satisfy the prerequisites for federally funded remedial action under § 104(c)(3). Moreover, "removal" costs, such as this preliminary field work, are only part of the authorized uses of the Response Fund overlooked in Reilly Tar's reading of § 111. 30/ Even if § 111 were deemed a restraint on § 107(a) liability, it would permit recovery of both removal and remedial action expenses and would be a far less restrictive restraint than Reilly Tar's "rewriting" of the statute depicts.

One final distinction emphasizing the independence of the liability scheme of § 107 from the Response Fund program of §§ 111-112 should be noted. Under § 303 of the Superfund Act, 42 U.S.C.A. § 9653, the collection of taxes for the Response Fund terminates on September 30, 1985, or sooner if the tax collection ceiling is reached. The Response Fund is thus temporary and

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29/ See the letter of February 25, 1981, from United States Attorney Thomas K. Berg to Reilly Tar which is attached to the Superfund brief of the United States. Minnesota is contributing five percent (5%) of the cost of these activities in accordance with the general federal assistance provision of 40 C.F.R. § 30.720(a).

30/ Also overlooked by Reilly Tar are the wide variety of other uses authorized by § 111(a)(4) and (c) (e.g., natural resource damage assessment and restoration, investigation and enforcement activities, health studies, and preparation of response capabilities).

limited in nature while the liability scheme is permanent and subject only to its internal limitations on liability for non-willful releases (§ 107(c)).

In sum, the creation of the Response Fund does not circumscribe in any manner the recovery of response costs from a party liable under § 107(a). Either type of response, "removal" or "remedial action," may be undertaken by the federal government or a state independently, by private parties when necessary, or by federal and state governments jointly under a § 104(c)(3) agreement or under other arrangements. In each of these instances characterization of the activity as "removal," "remedial action," or neither, depends solely on the definitions in § 101(23)-(24). The liability of the responsible party for activities which qualify as "removal" or "remedial action" can then be determined under § 107(a)(4)(A) and (B).

II. MINNESOTA'S AMENDED COMPLAINT STATES A CLAIM FOR NATURAL RESOURCE DAMAGES WHICH IS PROPER TO ASSERT AT THIS TIME EVEN THOUGH ADMINISTRATIVE DAMAGE ASSESSMENT PROCEDURES ARE NOT IN PLACE.

A. THE ADMINISTRATIVE DAMAGE ASSESSMENT PROCESS IS NOT A PREREQUISITE TO AN ACTION FOR NATURAL RESOURCE DAMAGES.

The state action for natural resource damages in § 107(a)(4)(C) 31/ is described by Reilly Tar as "an entirely new kind of liability" for which "Congress recognized that there is not even a developed body of law for measuring such damages." Reilly Tar First Superfund Brief at 18-19. Reilly Tar argues that these "novel" damages may not be sought until the administrative

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31 / § 107(a)(4)(C) extends liability to

> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

§ 107(f) authorizes states to recover natural resource damages:

> (f) In the case of an injury to, destruction of, or loss of natural resources under subparagraph (C) of subsection (a) of this section liability shall be to the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State.

procedures for assessment of damages are in place. Id. at 14-15. Reilly Tar has not done its homework. Liability for natural resource damages, including liability to state government, is found in both § 311(f) of the Clean Water Act, 33 U.S.C. § 1321(f), and § 303 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1813. The language used in these provisions is virtually identical to that chosen for the natural resource provisions of § 107(a)and (f) of the Superfund Act. In addition, such damages have frequently been awarded under state statutory and common law theories. 32/ Congress was aware of the heavy burden on governmental plaintiffs in proving damages of this nature and sought to facilitate such claims by fashioning a federal administrative assessment process to provide a rebuttable presumption as to the extent of damages. Congress could not have intended to block such claims while the assessment process was being assembled.

The Clean Water Act, as amended in 1977 by Pub. L. No. 95-217, creates a state natural resource damages claim for oil and hazardous substances damages. Section 311(f)(4) and (5) of the Clean Water Act, 33 U.S.C. § 1321(f)(4) and (5) state:

> (4) The costs of removal of oil or a hazardous substance for which the owner or operator of a vessel or onshore or offshore facility is liable under subsection (f) of this section shall include any costs or expenses incurred by the Federal Government or any State government in the restoration or replacement of natural resources damaged or destroyed as a result of a discharge of oil or a hazardous substance in violation of subsection (b) of this section.
>
> (5) The President, or the authorized representative of any State, shall act on behalf of the public as trustee of the natural resources to recover for the costs of replacing or restoring such resources. Sums recovered shall be used to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government, or the State government.

(Emphasis added.)

32/ See, e.g., Puerto Rico v. SS Zoe Colocotroni, 628 F.2d 652 (1st Cir. 1980) cert. den. 101 S. Ct. 1350 (1981); Maine v. M/V Tamano, 357 F. Supp. 1097 (D. Me. 1973), Maryland v. Amerada Hess Corp., 350 F. Supp. 1060 (D. Md. 1972); California v. S.S. Bournemouth, 307 F.Supp 922 and 318 F.Supp. 839 (C. D. Cal. 1970). Dept. of Envt'l Protection v. Jersey Central Power & Light Co., 124 N. J. Super. 97, 308 A.2d 671 (1973).

The Outer Continental Shelf Lands Act, as amended in 1978 by Pub. L. No. 95-372, provides for state natural resource damage claims for oil pollution to state lands. 43 U.S.C. § 1813 states in pertinent part:

> (a) Claims for economic loss, arising out of or directly resulting from oil pollution, may be asserted for-
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> (1) removal costs; and,
>
> (2) damages, including -
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> . . . .
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> (C) injury to, or destruction of, natural resources
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> (D) loss of use of natural resources;
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> . . . .
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> (b) A claim authorized by subsection (a) of this section may be asserted -
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> . . . .
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> (3) under paragraph (2)(C), by the President, as trustees for natural resources over which the Federal Government has sovereign rights or exercises exclusive management authority, or by any State for natural resources within the boundary of the State belonging to, managed by, controlled by or appertaining to the State, and sums recovered under paragraph (2)(C) shall be available for use to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government or the State, but the measure of such damages shall not be limited by the sums which can be used to restore or replace such resources;

(Emphasis added.)

The Report of the House Select Committee on the Outer Continental Shelf sets forth the purposes of § 303 of the Outer Continental Shelf Lands Act: 33/

> If natural resources are damaged or destroyed by an oil discharge, Federal or State governments may recover the costs and expenses of restoring, repairing, or replacing such resources. Replacement costs and expenses would only be recovered if it is impossible to otherwise restore or repair the resources. The committee anticipates the Federal or State governments would seek recovery when oil damages or destroys public beaches, marshlands, wetlands, fisheries, flora, fauna, wildlife, and other natural resources.

H. Rep. 95-590, 95th Cong. 2nd Sess. 182, reprinted in [1978] U.S. Code Cong. & Admin. News 1450, 1588.

33/ The provision of the House bill addressed in this report was approved in the House-Senate Conference Committee and ultimately enacted at § 303. H. Conf. Rep. 95-372, 95th Cong. 2nd Sess. 131, reprinted in [1978] U.S. Code Cong. & Admin. News 1674, 1730.

Although it addresses a broader definition of natural resources, 34/ the natural resources damage provision of section 107(a)(4)(C) of the Superfund Act is similar in purpose and virtually identical in language to § 303(a) and (b) of the Outer Continental Shelf Lands Act and § 311(f)(4) and (5) of the Clean Water Act. The Superfund Act goes beyond the earlier federal legislation in establishing regulations for damage measurement and procedures for damage assessment. §§ 111(h) and 301(c), 42 U.S.C.A. §§ 9611(h), 9651(c). Once these regulations and procedures are in effect, they are to apply to all natural resource damage claims under the Superfund Act and under § 311(f)(4) and (5) of the Clean Water Act. § 111(h)(1). In judicial proceedings brought under § 107(a) of the Superfund Act or under § 311(f) of the Clean Water Act, these damages assessments are to "have the force and effect of a rebuttable presumption on behalf of any claimant." § 111(h)(2).

The creation of a rebuttable presumption for governmental plaintiffs evidences Congress' intent to reduce the time and cost required in presenting natural resource damage claims and to create "an improved, fair and expeditious mechanism for dealing with natural resource damages caused by releases of hazardous materials." S.Rep. 96-848, supra at 85. Congress was aware of the extensive proof required in ecological damage cases from the Hazardous and Toxic Waste Disposal Field Hearings held by subcommittees of the Senate Environment and Public Works Committee in 1979. The hearing held in San Francisco in June, 1979, was chaired by Senator John H. Chafee, author of the natural resource damages provision of the Superfund Act. 35/ Senator Chafee's opening remarks focused on the difficulties under existing law in proving natural resource damages:

34/ The definition of natural resources in § 101(16), 42 U.S.C.A. § 9601(16), includes "ground water" and "drinking water supplies."

35/ See infra at 26.

> How do we go about putting some kind of a damage assessment on these [natural resource damages]; damages not just to the humans but also to the environment itself?
>
> . . . .
>
> Historically our legal system has been largely ineffective in compensating those who sustain an injury as a result of a spill or other type of discharge of oil or hazardous material into the environment. Trying to recover claims for damages to natural resouces through litigation under common law or existing statutory authority is a slow and certainly complex and generally inequitable manner of proceeding. 36/

The subcommittees heard testimony from an attorney, a biologist, and an economist with the State of California on difficulties California had experienced in recovering for natural resources damages. San Francisco hearing, supra at 180-190. Edwin J. Dubiel of the California Attorney General's Office explained that many claims were not pursued "because the proof would be far more expensive than the actual recovery." Id. at 182. He stressed the advantage to the states of a simplified means of damage assessment:

> So we have to reinvent the wheel each time, every case we go through; on a case-by-case method. Any type of a uniform method of determining the habitat or cost of the resource [that] could be applied would be of great assistance.

Id.

Aware of these difficulties in state recovery of natural resource damages, Congress sought to lessen the burden on claimants under the natural resource damage provisions of both the Clean Water Act and the Superfund Act through establishment of a federally administered damage assessment program. Therefore, it provided for an administrative assessment which "shall have the force and effect of a rebuttable presumption on behalf of any claimant." § 111(h)(2) (emphasis added).

36/ Hazardous and Toxic Waste Disposal Field Hearings, Joint Hearings Before the Subcommittees on Environmental Pollution and Resource Protection of the Committee on Environment and Public Works, United States Senate, 96th Cong. 1st Sess. 153 (hereinafter "San Francisco hearing.")

There are no indications in the Superfund Act or its legislative history that Congress sought to block damage claims under the Act or under § 311(f)(4) and (5) of the Clean Water Act for the two years (or longer) necessary to establish the assessment program. 37/ Because § 111(h) is directed to damage actions under both the Superfund Act and § 311(f) of the Clean Water Act, an interpretation that the assessment mechanism is a precondition to any damage action would create precisely the "gap" in effective law that Senator Randolph said was not intended. 38/ Such an interpretation would be tantamount to a repeal by implication of § 311(f)(4) and (5) of the Clean Water Act, contrary to the long established canon of construction against such repeals. See, e.g., Mercantile National Bank v. Langdeau, 371 U.S. 555, 565 (1963); Georgia v. Pennsylvania R. Co., 324 U.S. 439, 456-457 (1945); United States v. Borden Co., 308 U.S. 188, 198-199 (1939). Finally, had Congress intended the assessment mechanism to be a precondition to suit, it would have tolled the limitations period until the mechanism was in place. Instead, the limitations provision in § 112(d) simply states:

> . . . nor may an action be commenced for damages under this subchapter, unless that. . .action [is] commenced within three years from the date of discovery of the loss or December 11, 1980, whichever is later.

The administrative assessment mechanism was intended by Congress to be an aid to state recovery of natural resource

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37/ Reilly Tar cites a comment by co-sponsor Senator Stafford in support of its contention that there can be no action for natural resource damages until the assessment program is in effect. Reilly Tar First Superfund Brief at 16. The context of this quotation is discussed infra at page 21 and shows that Senator Stafford was saying (1) that the measure of natural resource damages can exceed expenditures for restoration and replacement and (2) that such "non-restorative" damages can be ascertained only after the cleanup measures are worked out. This two step approach is the most logical process for determining damages, regardless of the existence of an adminstrative assessment mechanism. Senator Stafford was not saying that the administrative assessment was a condition precedent to any natural resource damage claim.

38/ Senator Randolph's statement is quoted supra at page 8.

damages. It would be a bitter irony if the assessment provisions were construed to bar such claims under § 107(a)(4)(C) for the several years which may pass until the program is in place. The Congressional objective can best be fulfilled by a ruling that Minnesota's natural resource damage claim is not premature.

B. EVEN IF THE ASSESSMENT MECHANISM WERE A PRECONDITION TO AN AWARD OF NATURAL RESOURCE DAMAGES, IT IS PROPER FOR MINNESOTA TO ASSERT ITS DAMAGE CLAIM AT THIS TIME IN ACCORDANCE WITH ESTABLISHED TORT PRINCIPLE AND THE GOALS OF THE SUPERFUND ACT.

If it is assumed for purposes of argument that the assessment mechanism is a precondition to an award of damages under § 107(a)(4)(C), dismissal of the State's natural resources claim should still be denied under an established tort principle. This principle has been developed in cases of industrial illnesses which do not manifest symptoms until a considerable time after initial exposure. It requires that an action should be commenced when some injury attributable to the industrial exposure is discovered, even though the ultimate damage cannot be ascertained at that time. This principal achieves fairness to both plaintiff and defendant because it assures plaintiff that he will not be time barred from asserting a claim he could not have earlier recognized, and it gives defendant the earliest reasonable notice in order to preserve evidence for his defense. The principle was summarized in a Minnesota Supreme Court decision holding that a worker's claim for injuries resulting from workplace exposure to toxic chemicals was time barred. Dalton v. Dow Chemical, 280 Minn. 148, 158 N.W.2d 580 (1968). The court observed in Dalton:

> Ordinarily there is a coincidence of negligent act and the fact of some damage. Where that occurs the cause of action comes into being and the applicable statute of limitations begins to run even though the ultimate damage is unknown or unpredictable. . . . Until there is some damage, there is no claim and certainly a statute prescribing the time in which suit must be filed. . .can never operate prior to the time a suit would be permitted.

280 Minn. at 154, quoting United States v. Reid, 251 F.2d 691, 694 (5th Cir. 1958) (emphasis added.)

The Eighth Circuit followed the same principle in Continental Grain Co. v. Fegles Construction Co., 480 F.2d 793, 797 (8th Cir. 1973):

> It is not necessary for the final or ultimate damages to be known or predictable, however, the statute begins to run when some damage occurs which would entitle the victim to maintain a cause of action.

Accord, Urie v. Thompson, 337 U.S. 163, 168-171 (1949); Williams v. Borden, Inc., 637 F.2d 731, 734-735 (10th Cir. 1980); Karjala v. Johns-Mansville Products Corp., 523 F.2d 155, 159-160 and n.7 (8th Cir. 1975).

This principle should be applied in the present context of damage to ground water resources. Like industrial diseases, ground water contamination is usually not detected for years after the causal acts and the severity of the damage often requires further years for accurate determination. The long period of industrial discharge and the lengthy investigations which led to initiation of the present lawsuit certainly fit this pattern. See First Giese Affidavit at paragraphs 7 - 21. The allegations of extensive soil and ground water contamination in the Amended Complaint are sufficient for the present motion to establish that some damage has been suffered. In accordance with the policies of fairness to plaintiffs and prompt notice to defendants developed in the industrial illness context, it would be appropriate to permit Minnesota's claim for natural resource damages to stand even when further administrative determinations are necessary to quantify the amount of such damages.

Finally, in regard to the role of the assessment mechanism, it is important to consider that in the Superfund Act's multi-faceted approach to hazardous substance release the fundamental objective is always clean-up of the materials released. The Act is structured to encourage clean-up by the responsible party, by the Response Fund, and by other governmental action. To the extent that future actions by Reilly Tar, by the federal government, or by State and local governments remove the

soil and groundwater contamination, the claim for natural resource damages will be reduced. 39/

The top priority assigned clean-up is evident in the history of the parallel provisions of the Outer Continental Shelf Lands Act and in the Superfund debate on the Senate floor. As noted supra at 20, the House Select Committee on the Outer Contintental Shelf stated in regard to oil damage to beaches, marshlands, and wetlands:

> Replacement costs and expenses would only be recovered if it is impossible to otherwise restore or repair the resources.

H. Rep. 95-590, supra at 182.

Similar intent was voiced in the Senate debate on the Superfund Act. Senator Chafee, who authored the natural resource restoration provisions in the Act 40/, stated that the need to clean up hazardous waste sites and spills was "fast becoming the most serious environmental problem of our time." 126 Cong. Rec. S. 15,003 (daily ed. Dec. 3, 1980). Senator Stafford, replying to a question from Senator Alan Simpson about the provision of § 107(f) authorizing natural resource damages beyond the costs for restoration and replacement, 41/ stressed that "no damages. . . be pursued until a restoration [sic] plan is developed." 126 Cong. Rec. S. 15008 (daily ed. Dec. 3, 1980).

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39 / Of course, if Reilly Tar does not pay for these actions, the natural resources claim will be converted to a response cost claim.

40 / 126 Cong. Rec. S. 15,003 (daily ed. Dec. 3, 1980).

41 / Senator Simpson was referring to the following provisions of § 107(f):

> The President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for such damages. Sums recovered shall be available for use to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government or State government, but the measure of such damages shall not be limited by the sums which can be used to restore or replace such resources.

This emphasis on clean-up means that even if the assessment process were in place, actual assessment in the present case could only be done after the remedial program had been worked out. Since precise damages could not presently be ascertained even with the assessment process, it is appropriate to allow the damage claim to stand for purposes of determining liability and to await resolution of the clean-up issues before addressing the amount of natural resource damages.

III. THE WORDS "WHOLLY BEFORE THE ENACTMENT" IN § 107(f) AND THE PRACTICAL IMPOSSIBILITY OF SEGREGATING GROUND WATER DAMAGES BEFORE AND AFTER ENACTMENT REQUIRE REJECTION OF REILLY TAR'S ARGUMENT THAT NATURAL RESOURCE DAMAGES BE LIMITED TO THOSE OCCURRING ON OR AFTER DECEMBER 11, 1980.

The last sentence of § 107(f) states:

> There shall be no recovery under the authority of subparagraph (C) of subsection (a) of this section [107(a)(4)(C)] where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before the enactment of this Act.

(Emphasis added).

The conjunction "and" and the adverb "wholly" in § 107(f) show that liability of the responsible party for natural resource damages exists unless (1) all releases ended before December 11, 1980, and (2) no damages were suffered on or after December 11, 1980. The Amended Complaint alleges that hazardous substances "are presently continuing to leach and migrate into the aquifer system which underlies St. Louis Park, Hopkins, and surrounding communities." Amended Complaint, paragraph 40. It further alleges that these hazardous substances "are presently continuing to spread and cause further damage." Id., paragraph 41.

A "release" is defined in § 101(22), 42 U.S.C.A. § 9601(22), to include "leaching" or "leaking" into the environment. As Reilly Tar acknowledges in its initial memorandum seeking dismisal of the RCRA claims 42/, leaching describes the process by which

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42/ Statement of Points and Authorities in Support of Defendant, Reilly Tar & Chemical Corporation's Motion to Dismiss the Complaint of the United States of America at 16, note 8.

liquids and suspended components move out of waste materials and spread in the ground water system. This process is alleged in the Amended Complaint to be taking place at and near the former Reilly Tar site. 43/

The allegations of continuing damages in Paragraph 41 of the Amended Complaint are underscored by the contamination of a Hopkins municipal well in February, 1981 (Amended Complaint, paragraph 8), and the contamination of another St. Louis Park municipal well in August, 1981 (Supplemental Giese Affidavit at paragraph 3). Thus, neither of the two elements necessary to excuse Reilly Tar from natural resource damage liability under § 107(f) are present.

Although the plain language of § 107(f) is sufficient grounds for rejection of the limitation on damages urged by Reilly Tar, the Court should also recognize the practical impossibility of segregating damages occurring before and after December 11, 1980. The difficulties in tracing groundwater contamination were noted in the 1976 report of the House Committee on Science and Technology cited at pages 15-16 of the State's June 15, 1981, Memorandum. The particularly sudden migration of contaminants in the ground water affected in the present case has been noted in the First Giese Affidavit at paragraph 22-25 and the Supplemental Giese Affidavit at paragraph 4. Congress did not intend in § 107(f) to create a standard impossible to apply. It chose the adverb "wholly" so that if any release or any damage were occurring on or after the enactment of the Superfund Act, the entire damage could be addressed under § 107(a)(4)(C).

43/ For purposes of the motion to dismiss the claims under § 7003 of RCRA, it should be noted that a New Jersey federal district court recently held that "disposal" under § 7003 "includes within its purview leaking, which ordinarily occurs not through affirmative action but as a result of inaction or negligent past action." United States v. Charles Price, No. 80-4104 (D.N.J. Sept. 23, 1981), slip op. at 45 (attached as Appendix C to Reilly Tar's Reply Memorandum of October 16, 1981). The court ruled that both the landfill operators who placed the hazardous substances in the ground in the early 1970's and the current landowners who acquired the property with knowledge of its prior use were parties "contributing to disposal" under § 7003. Id. at 44-45, 51.

Finally, a response is required to Reilly Tar's reference to a comment in S. Rep. 96-848 reflecting the legislative history of the last sentence of § 107(f). Reilly Tar First Superfund Brief at 20. The last clause of § 4(n)(1) of S. 1480 44/ was enacted in a narrower context but without change in meaning as the last sentence of § 107(f) of the Superfund Act. (The narrower context resulted when the final bill dropped provisions referenced in § 4(n)(1) creating liability for property damage and for loss of earnings resulting from personal injury.) The portion of the Senate report quoted by Reilly Tar states that the last clause of § 4(n)(1) "allows for recovery only of prospective natural resource and property damages." S. Rep. 96-848, supra at 37. The preceding paragraph in the Senate report, however, makes clear that continuing releases, such as are alleged in the Amended Complaint, are completely outside the limitation of § 4(n)(1):

> Section 4(n) specifies how claims for certain damages occurring before the date of enactment will be handled under S. 1480. Costs of removal (clean-up and containment) are not affected by this provision, nor are any damages associated with continuing releases.

Id. (emphasis added).

Viewed in its full context, the legislative history found in S.Rep. 96-848 is consistent with the plain meaning expressed in the last sentence of § 107(f) -- if any releases or any damages occur on or after December 11, 1980, the natural resources damage liability of § 107(a)(4)(C) will apply.

44/ The significance of Senate bill S. 1480 in the legislative history of the Superfund Act is discussed supra at 15, note 24.

CONCLUSION

For the reasons stated in this memorandum and the State's previous memorandum of June 15, 1981, the motions of Reilly Tar to dismiss Minnesota's claims under § 7003 of RCRA and § 107 of the Superfund Act, or to strike certain of the prayers for relief, should be denied.

Dated: December 28, 1981.

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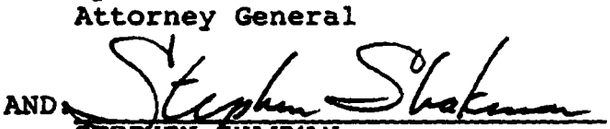
AND: 
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